State v. Korum (Jacob Melvin)
Majority by Fairhurst, J.
Concurring in the majority J.M. Johnson, J.

No. 75491-8

J.M. JOHNSON, J. (concurring in part and concurring in judgment)—Neither the United States Supreme Court nor this court has ever applied the presumption of prosecutorial vindictiveness in the pretrial context, and for good reason. I write separately to emphasize those precedents and the mistakes in the dissent's assertion or implication to the contrary. I also write because much of the majority's arguendo analysis of alleged, but unproven, pretrial vindictiveness was unnecessary to dispose of this case.[1]

The plea negotiation process is so important to our justice system that the system cannot function without it. Were this court to apply a presumption of prosecutorial vindictiveness where criminal charges are increased in the pretrial context, the "give and take" dynamics of such plea negotiations would be undermined. Prosecutors would face judicial second-guessing of the discretionary

[1] Specifically, I concur with the majority, except as to part III, section B(2). Concerning that section, I concur in judgment only.

charging decision that courts have long recognized as exclusively executive. To protect against such challenges, prosecutors may choose to file maximized criminal charges against defendants prior to plea negotiations. Ironically, the dissent's position would thus harm defendants who look to the plea negotiation process for leniency. Victims, whose rights are protected by article I, section 35 of our constitution, would be totally disregarded.

Here, there is no objective evidence of vindictive charging. Jacob Korum cannot escape jury convictions for crimes he committed as a participant in numerous home invasions and criminal charges he properly faced after pretrial plea negotiations failed.

Analysis

Relevant precedent explicitly and categorically *rejects* the extension of a presumption of prosecutorial vindictiveness to the pretrial setting. Any such extension would be a reversal of this court's holdings and contravene the rationale of United States Supreme Court cases addressing the issue.

I reiterate our better supported, preexisting standard that a presumption of prosecutorial vindictiveness may be applied only at the posttrial and appeal stages, i.e., where a prosecutor greatly increases charges after a defendant successfully

asserts constitutional rights on appeal after trial. In that case, it is a justifiable presumption the increase in charges is *because* the defendant asserted his rights on appeal and prevailed—with the result of a new trial. This presumption shifts the burden, and the presumption may be rebutted by the State.

At the pretrial stage, the defendant must offer evidence to objectively *prove actual* prosecutorial vindictiveness (a most difficult standard, for good reasons). This court held in *State v. McDowell*, 102 Wn.2d 341, 344, 685 P.2d 595 (1984) that "Washington case law, in accord with *Goodwin*, suggests that actual vindictiveness is required to invalidate the prosecutor's adversarial decisions made prior to trial." Citing United States Supreme Court precedent, we expressly concluded that a presumption of prosecutorial vindictiveness does not apply in the pretrial context. *Id.* This holding had been uniformly applied throughout our state. *See, e.g., State v. Bonisisio*, 92 Wn. App. 783, 790-91, 964 P.2d 1222 (1998); *State v. Lee*, 69 Wn. App. 31, 37, 847 P.2d 25 (1993)

Any suggested extension of the presumption of prosecutorial vindictiveness to the pretrial stage flies in the face of the two most important United States Supreme Court holdings. In *United States v. Goodwin*, 457 U.S. 368, 382-84, 102 S. Ct. 2485, 73 L. Ed. 2d 74 (1982) and *Bordenkircher v. Hayes*, 434 U.S. 357, 98 S. Ct.

663, 54 L. Ed. 2d 604 (1978), the Court flatly refused to extend the presumption to the pretrial stage. The reasoning in both cases led to a similar conclusion in this case.

Goodwin's refusal to extend a vindictiveness presumption to the pretrial setting reflects recognition that pretrial charging allows exercise of broad discretion by a prosecutor. 457 U.S. at 381 ("There is good reason to be cautious before adopting an inflexible presumption of prosecutorial vindictiveness in a pretrial setting.") See also this court's decision in *State v. Lewis,* 115 Wn.2d 294, 299, 797 P.2d 1141 (1990) (discussing the "long-recognized principle that prosecutors are vested with wide discretion in determining how and when to file criminal charges") (citing *Bordenkircher*, 434 U.S. at 365); *State v. Penn*, 32 Wn. App. 911, 914, 650 P.2d 1111 (1982).

Goodwin noted that prosecutorial discretion would be undermined if courts required anything less than objective proof of *actual* vindictiveness to overturn pretrial actions. 457 U.S. at 384. The court also recognized that during the period of plea negotiations the prosecutor may uncover additional information or discover that the State's information has broader significance. *Id.* at 381. This happened here; Korum's involvement in more home invasions became clearer during the

investigation. *See, e.g.,* majority at 20 (citing Clerk's Papers at 187, 1056-57).

The worst result here would be reached by the dissent, which would allow Korum a free pass on all the additional counts from the criminal home invasions, which occurred prior to August 30, 1997. Four home invasions would go unpunished (with multiple victims) if the dissent had its way. *See* dissent (Madsen, J.) at 15-16. As noted above, victims have constitutional rights (article I, section 35), which the dissent totally disregards.

In plea negotiations, prosecutors must take into account the strength of the State's case and consider "the burdens and uncertainty of a trial." *Goodwin*, 457 U.S. at 382. *See also Lewis,* 115 Wn.2d at 299 ("Exercise of this discretion involves consideration of numerous factors, including the public interest as well as the strength of the State's case.") (citing *United States v. Lovasco*, 431 U.S. 783, 794, 97 S. Ct. 2044, 52 L. Ed. 2d 752 (1977)). Given that "[m]otives are complex and difficult to prove," *Goodwin* restated the importance of allowing latitude to prosecutors entrusted with charging decisions. *Goodwin*, 457 U.S. at 373. However, this necessary discretion would be undermined by *presuming* vindictiveness at any time where charges have been increased. We should be mindful of "the severity of such a presumption . . . which may operate in the

absence of any proof of an improper motive and thus may block a legitimate response to criminal conduct." *Id.*

The plea negotiation process always requires explicit waiver of the defendants' right to plead not guilty and receive a jury trial. Prosecutors are expected to press defendants to waive such rights and plead to charges. As the United States Supreme Court in *Bordenkircher* noted, "by tolerating and encouraging the negotiation of pleas, this Court has necessarily accepted as constitutionally legitimate the simple reality that the prosecutor's interest at the bargaining table is to persuade the defendant to forgo his right to plead not guilty." 434 U.S. at 364. In plea bargaining, vindictiveness cannot be presumed "so long as the accused is free to accept or reject the prosecution's offer." *Id.* at 363. The necessary context of negotiations allows the prosecutor's "carrying out a threat, made during plea negotiations, to bring additional charges against an accused who refused to plead guilty to the offense with which he was originally charged." *Goodwin*, 457 U.S. at 377. Extending a presumption of vindictiveness to increase of charges at the pretrial stage puts the plea negotiating process in tension with its underlying purposes.

Goodwin also insists that the plea negotiation setting is not appropriate to

apply a presumption of vindictiveness just because charges are increased. The possibility of leniency through a plea negotiated abandonment of charges "is clearly a 'benefit' to the defendant" and the threat of more charges is normally the downside. *Id.* at 379. The United States Supreme Court acknowledged that "the initial charges filed by a prosecutor may not reflect the extent to which an individual is legitimately subject to prosecution." *Id.* at 382. Accordingly, *Goodwin* concluded that "changes in the charging decision that occur in the context of plea negotiation are an inaccurate measure of improper prosecutorial 'vindictiveness.'" 457 U.S. at 379-80. The Court of Appeals previously heeded this warning, lest "a legitimate plea negotiation tool" be removed from the process, thereby making prosecutors unlikely to "exercise their legitimate discretion to charge a lesser offense initially in the reasonable expectation of obtaining a guilty plea, thus saving the State from the necessity of protracted plea negotiations and/or a trial." *Lee*, 69 Wn. App. at 38. *See also Bordenkircher*, 434 U.S. at 365. Application of a presumption of vindictiveness in the pretrial setting by appellate courts may even prompt prosecutors to charge a defendant with every possible offense in order to preserve all charges where a defendant rejects a plea.

These relevant precedents all provide that, as a matter of law, there is no

presumption of prosecutorial vindictiveness in the pretrial stage. The majority should have decided the case upon that basis and clearly reversed the Court of Appeals, rather than assuming Korum's *legal* argument arguendo and proceeding to reject Korum's *factual* argument.

The dissent, however, musters a few federal cases suggesting a presumption where charges are raised at the pretrial stage. Dissent (Madsen, J.) at 11-13. None are from the United States Supreme Court, and even those authorities are rebutted by the better considered authorities. *See, e.g., United States v. Jarrett,* No. 05-2844, 2006 U.S. App. LEXIS 11433, ___ F.3d ___ (7th Cir. 2006); *United States v. Gamez-Orduno*, 235 F.3d 453, 463 (9th Cir. 2000); *Paradise v. CCI Warden*, 136 F.3d 331, 335 (2d Cir. 1998); *United States v. Yarbough*, 55 F.3d 280, 282-83 (7th Cir. 1995).

Furthermore, the better reasoned decisions have declined to extend the presumption to pretrial charging decisions where the defendant has withdrawn from a plea agreement. *See United States v. Barner,* 441 F.3d 1310, 1319 (11th Cir. 2006); *Yarbough*, 55 F.3d at 283; *United States v. Cooks*, 52 F.3d 101, 105-06 (5th Cir. 1995); *United States v. Stanley*, 928 F.2d 575, 579 (2d Cir. 1991). Nor do increased charges following a failed plea negotiation prove vindictiveness. *See*

Alabama v. Smith, 490 U.S. 794, 802, 109 S. Ct. 2201, 104 L. Ed. 2d 865 (1989) ("we have upheld the prosecutorial practice of threatening a defendant with increased charges if he does not plead guilty, and following through on that threat if the defendant insists on his right to stand trial.") (citing *Bordenkircher*, 434 U.S. at 363); *Lee*, 69 Wn. App. at 36; *Gamez-Orduno*, 235 F.3d at 462-63; *United States v. Noushfar*, 78 F.3d 1442, 1446 (9th Cir. 1996).

Here, charges were brought exceeding those Korum initially faced, but the correct baseline is not the initial charges. The relevant comparison includes the unfiled charges the prosecution warned Korum he would face if he rejected a plea. *Goodwin* held an increased charge brought after a "warning" by a prosecutor in plea negotiation does not support a claim of prosecutorial vindictiveness. 457 U.S. at 382 n.15.

One of the benefits for Korum in his plea agreement was limiting charges to the 16 first charged. When Korum withdrew his plea agreement, the State returned to its earlier bargaining position. The prosecutor carried out the "warning" to Korum in a manner entirely permissible under the above precedents. Defendants, such as Korum, are responsible for the consequences of withdrawal from a plea agreement, especially where subsequently convicted of the charges by a jury of his

peers. "That a prosecutor may offer 'hardball' choices to a defendant does not make the process constitutionally unfair, so long as the choices are realistically based upon evidence and options known to both sides." *Lee*, 69 Wn. App. at 36.

United States Supreme Court precedent also makes clear that lengthier sentences are a permissible and likely outcome following a jury trial rather than a plea agreement. A trial allows a judge to gather a more complete picture of the defendant as a morally culpable human being. *See Smith*, 490 U.S. at 801 (noting through proof at trial the judge may gain "a fuller appreciation of the nature and extent of the crimes charged," and "insights into his moral character and suitability for rehabilitation."). Further, the court explicitly stated in *Alabama v. Smith* "that there is no basis for a presumption of vindictiveness where a second sentence imposed after a trial is heavier than a first sentence imposed after a guilty plea." 490 U.S. at 803. Where there is no proof of actual vindictiveness, "[a] defendant's ultimate protection against overcharging lies in the requirement that the State prove all elements of the charged crime beyond a reasonable doubt." *Lee*, 69 Wn. App. at 37-38.

Conclusion

The courts have reasonably questioned dramatic increase in charges post

trial—where charges have been greatly increased after a convicted defendant appeals on constitutional issues. Such a case suggests the prosecution is penalizing a defendant who successfully asserts his rights. This is not such a case. These charges were increased pretrial when a plea was withdrawn by the defendant. Extension of the presumption of vindictiveness to such a case in which charges are increased pretrial does not reflect the United States Supreme Court's holdings or these of this court and would detrimentally affect the pretrial plea process that is so necessary to the operation of our justice system.

I concur in the judgment reversing the dismissal of counts 17-22 and 24-32 for prosecutorial vindictiveness and disposing of the other charges as indicated by the majority.

AUTHOR:
Justice James M. Johnson

WE CONCUR: